Perwira Habib Bank Malaysia Bhd v Hong Huat Holdings Sdn Bhd & Ors

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-363 OF 1989
MOHAMED AZMI, GUNN CHIT TUAN AND EUSOFF CHIN SCJJ
27 APRIL 1992

Civil Procedure *— Stay of execution — Pending disposal of subsequent action — Whether High Court could grant interlocutory injunction to stay execution of summary judgment decreed by another High Court of concurrent jurisdiction and upheld by Supreme Court — No application for stay made when summary judgment was granted or on appeal — Rules of the High Court 1980 O 14 r 3(2) — Courts of Judicature Act 1964 s 73 — Specific Relief Act 1950 s 54*

Civil Procedure *— Summary judgment — Stay of execution pending disposal of subsequent action — No application for stay made when summary judgment was granted or on appeal — Whether right to stay waived — Rules of the High Court 1980 O 14 r 3(2)*

The appellant had been granted summary judgment for the sum of $13.9m against the respondents. The judgment was obtained in respect of the repayment of a bridging loan given by the appellant to the respondents to finance their housing projects. No defence was filed by the respondents but in their affidavit in opposition to the O 14 proceeding, they did raise matters which the learned trial judge held could not constitute a defence but could constitute a separate cause of action. This finding was not challenged on appeal when the O 14 judgment was upheld by the Supreme Court. The respondents did not apply for a stay of execution of the summary judgment either in the High Court or the Supreme Court. Subsequently the respondents commenced an action against the appellant as a separate suit. They applied for an interlocutory injunction to stay execution of the summary judgment pending the disposal of the subsequent action. This was granted in the High Court and the application of the appellant to set it aside was dismissed. The appellant appealed.

Held, allowing the appeal:

(1) As the respondents had not applied for a stay of execution of the summary judgment under O 14 r 3(2) of the Rules of the High Court 1980, the respondents must be taken to have waived their rights to a stay of proceeding of the O 14 action and they were therefore estopped from arguing that the present action was in fact or in substance a counterclaim raised in the former action entitling them to a stay of execution.

(2) Even if the present action could be construed as a counterclaim to the earlier O 14 action, the discretion of the court ought not to be exercised in favour of the respondents by granting them a stay at this late stage by means of an interlocutory injunction. To allow them to do so would be tantamount to permitting the respon-

dents to abuse the process of the court and would unreasonably prejudice the appellant from enjoying the fruits of their final judgment.

(3) On the facts and circumstances of this case, the interlocutory injunction could not be sustained in view of the failure of the learned judge to consider the relevant statutory provisions governing stay of execution of a summary judgment where a counterclaim had been made or raised, quite apart from his failure to consider critically not only the issue of balance of convenience but also to consider what serious questions need possibly be tried in the pending action particularly when all that was left for determination was the assessment of damages.

(4) In the event the granting and continuing of the interlocutory injunction in this case could not be said to be an exercise of judicial discretion by the learned judge and the appellant's application to discharge the injunction ought therefore to be allowed.

[Bahasa Malaysia summary

Perayu di dalam kes ini telah mendapat penghakiman terus untuk jumlah wang $13.9 juta terhadap responden. Penghakiman itu telah diperolehi berkenaan dengan pembayaran balik pinjaman bridging (bridging loan) yang telah diberi oleh perayu kepada responden untuk membiayai projek perumahan mereka. Tidak ada pembelaan difailkan oleh responden akan tetapi di dalam affidavit mereka membangkang prosiding A 14, mereka telah menimbulkan beberapa perkara yang mana hakim yang arif memutuskan tidak boleh menjadi pembelaan akan tetapi boleh menjadi kausa tindakan berasingan. Keputusan itu tidak dipertikaikan di dalam rayuan apabila penghakiman A 14 itu disahkan oleh Mahkamah Agung. Responden tidak memohon penggantungan pelaksanaan penghakiman terus itu di Mahkamah Tinggi atau di Mahkamah Agung. Kemudiannya responden telah memulakan tindakan terhadap perayu di dalam guaman berasingan. Mereka memohon injunksi interlokutori untuk menggantung pelaksanaan penghakiman terus itu sementara menanti penyelesaian tindakan kemudian itu. Injunksi tersebut telah diberi di Mahkamah Tinggi dan permohonan perayu mengetepikannya telah ditolak. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Oleh kerana responden tidak memohon penggantungan pelaksanaan penghakiman terus itu di bawah A 14 k 3(2) Kaedah-Kaedah Mahkamah Tinggi 1980, responden hendaklah dianggap telah melepaskan hak mereka bagi penggantungan prosiding tindakan A 14 itu dan oleh kerana itu mereka diestop daripada menghujah bahawa tindakan sekarang ini adalah sebenarnya atau pada hakikatnya suatu tuntutan balas yang ditimbulkan dalam tindakan terdahulu itu yang memberi mereka hak mendapat penggantungan pelaksanaan.

(2) Walaupun tindakan sekarang ini boleh ditafsirkan sebagai suatu tuntutan balas kepada tindakan A 14 yang terdahulu itu, budi bicara mahkanah tidak seharusnya digunakan bagi faedah responden dengan memberi mereka penggantungan pelaksanaan di peringkat yang lewat ini melalui injunksi interlokutori. Membenarkan mereka membuat demikian adalah seakan-akan membenarkan responden menyalahgunakan proses mahkamah dan akan dengan tidak munasabahnya memudaratkan perayu dari menikmati hasil penghakiman muktamad mereka.

(3) Atas fakta dan keadaan kes ini, injunksi interlokutori itu tidak boleh dipertahankan memandang kepada kegagalan hakim yang arif menimbangkan peruntukan statutori yang berkenaan mengenai penggantungan pelaksanaan penghakiman terus apabila sesuatu tuntutan balas dibuat atau ditimbulkan, bertambah pula kegagalan beliau menimbangkan dengan teliti bukan sahaja soal imbangan faedah tetapi juga apa soalan yang serius yang perlu dibicarakan di dalam tindakan yang belum selesai terutama sekali jika apa yang tinggal untuk diputuskan ialah taksiran ganti rugi.

(4) Oleh kerana itu pemberian dan penerusan injunksi interlokutori itu di dalam kes ini tidak boleh dikatakan sebagai penggunaan budi bicara kehakiman oleh hakim yang arif itu dan permohonan perayu untuk membatalkan injunksi itu hendaklah dibenarkan.]

Notes

For cases on stay of execution, see 2 *Mallal's Digest* (4th Ed) paras 975–987.

Cases referred to

1 *Sheppards & Co v Wilkinson & Jarvis* (1889) 6 TLR 13 (refd)
2 *Lee Guat Eng v Seet Tiam Hock* [1974] 1 MLJ 178 (refd)
3 *Societe des Etains de Bayas Tudjuh v Woh Heng Mining Kongsi* [1978] 2 MLJ 267 (refd)
4 *PH Grace Pte Ltd & Ors v American Express International Banking Corp* [1987] 2 MLJ 437 (refd)
5 *Tan Suan Choo v Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323 (distd)
6 *Bina Satu Sdn Bhd v Tan Construction* [1988] 1 MLJ 533 (distd)
7 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396; [1975] 2 WLR 316; [1975] 1 All ER 504 (folld)
8 *Penang Han Chiang Associated Chinese School Association v National Union of Teachers in Independent Schools, West Malaysia* [1988] 1 MLJ 302 (folld)

Legislation referred to

Companies Act 1965 ss 217, 218
Courts of Judicature Act 1964 ss 23(2), 73
Specific Relief Act 1950 s 54
Rules of the High Court 1980 O 14 r 3(2), O 47 r 1(1)

Appeal from: Civil Suit No D1–22–1541–1989 (High Court, Kuala Lumpur)

DP Naban (*Skrine & Co*) for the appellant.
KS Narayanan (*KS Narayanan Associates*) for the respondents.

Mohamed Azmi SCJ (delivering the grounds of judgment of the court): This appeal raises an interesting question of law as to whether the High Court should, pending the disposal of a subsequent action, grant an interlocutory injunction to stay execution of a summary judgment decreed by another High Court of concurrent jurisdiction after the judgment has been upheld by the Supreme Court. Mr Naban for the appellant bank says that there is no such power and in any event it should not be granted, whilst Mr Narayanan for the respondents argues otherwise by contending that the prohibition imposed against issuing of injunction under s 54(a) and (b) of the Specific Relief Act 1950 is applicable only to perpetual injunction but not to interlocutory injunction.

In the present case, the appeal is against the order of Anuar J made in chambers on 11 September 1989 dismissing the appellant's application to set aside an ex parte interlocutory injunction which his Lordship had granted to the plaintiffs (respondents before us) on 20 July 1989 restraining the appellant bank from levying any execution proceeding of a final judgment of another High Court decreed by Harun Hashim J (as he then was) on 13 April 1988 vide Kuala Lumpur High Court Civil Suit No C23–2831–86 and upheld on appeal by the Supreme Court on 31 May 1989 vide Supreme Court Civil Appeal No 249 of 1988 (hereinafter referred to as 'the 1986 action').

In that 1986 action, the present appellant was granted a summary judgment for the sum of $13.9m against the present respondents under O 14 of the Rules of the High Court 1980 ('RHC'). The judgment was obtained in respect of repayment of a bridging loan given by the appellant to the respondents to finance their housing projects which had long been abandoned. It is common ground that in the proceedings before Harun Hashim J, the O 14 application was properly made before the respondents had filed a defence. In fact a defence was never filed even on the day when the summary judgment was entered in favour of the bank. But in their affidavit in opposition to the O 14 proceeding, they did raise matters which Harun Hashim J held could not constitute a defence but could constitute a separate cause of action. This finding was not challenged on appeal when the O 14 judgment was upheld by the Supreme Court. On the contrary, relying apparently on this very finding, the present action against the appellant bank was filed by the respondents as a separate suit on 19 July 1989 vide Kuala Lumpur High Court Civil Suit No D1–22–1541–89 (hereinafter referred to as 'the present action'). It is also alleged that at the conclusion of the O 14 proceeding in the 1986 action, the respondents never applied for a stay of execution of the summary judgment either in the High Court or the Supreme Court pending the filing of the present action.

Order 14 r 3(2) of the RHC provides:

> The Court may by order, and subject to such conditions, if any, as may be just, stay execution of any judgment given against a defendant under this rule until after the trial of any counterclaim *made or raised* by the defendant in the action. (Emphasis supplied.)

Further, in *Sheppards & Co v Wilkinson & Jarvis*,[1] Lord Esher MR laid down the principle as to whether under O 14 application where a counterclaim has been raised by the defendant, a summary judgment should notwithstanding the counterclaim be given to the plaintiff and if such judgment be given whether execution thereon should be stayed. This matter was also discussed in *Lee Guat Eng v Seet Tiam Hock*[2] and in *Societe des Etains de Bayas Tudjuh v Woh Heng Mining Kongsi*,[3] and also in the Singapore case of *PH Grace Pte Ltd & Ors v American Express International Banking Corp*[4] at p 438. For the purpose of this appeal it is sufficient to summarize that these authorities provide that a summary judgment can be granted notwithstanding the fact that a counterclaim has been made or raised.

The power of the High Court to grant a stay of execution is conferred by O 47 r 1(1) of the RHC on special circumstances (see *Mallal's Supreme Court Practice* p 573). In O 14 proceeding, an application for stay of execution may be made by a defendant without the issue of a separate summons at the time summary judgment was given against him. Further s 73 of the Courts of Judicature Act 1964 provides:

> An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Supreme Court so orders and no intermediate act or proceeding shall be invalidated except so far as the Supreme Court may direct.

In this appeal we are satisfied on the evidence that a stay of execution was never applied for in the 1986 action. Consequently, no stay of execution proceeding was granted either by the High Court or the Supreme Court because everybody apparently agreed that the matters raised in the respondents' affidavit in opposition before Harun J (as he then was) could not constitute a defence but should be treated as a separate action against the appellant bank. But what was overlooked by the respondents was that since they held the view that the matters raised could constitute or was in substance a counterclaim, the respondent had the opportunity to apply for a stay of execution of the summary judgment under O 14 r 3(2) of the RHC. By electing not to do so, the respondents must be taken to have waived their rights to a stay of proceeding of the 1986 action, and they are therefore estopped from now arguing that the present action is in fact or in substance a counterclaim raised in the 1986 action entitling them to a stay. Consequently, we are of the opinion that the argument of Mr Narayanan that there was a counterclaim in the 1986 action or that the present action in this appeal should be treated as a counterclaim, is irrelevant and of no consequence.

It should be observed that to entitle the respondents to apply for a stay of execution of the summary judgment under O 14 r 3(2), it is not necessary that a defence with a counterclaim has been filed. It is sufficient that the

counterclaim has been raised in the affidavit in opposition to the O 14 application. In our view, this is clear from O 14 r 3(2) itself. Mr Narayanan has brought to our attention that the alleged counterclaim has in fact been raised in the respondents' affidavit. That being so, his argument on the fact that no defence had been filed during the O 14 proceeding is no excuse for not applying for a stay in the High Court or the Supreme Court. As alluded to earlier, the respondents have waived their rights to stay the summary judgment pending the disposal of the present action even if the present action could be construed as a counterclaim to the 1986 action, and as such the discretion ought not to be exercised in their favour by granting them a stay at this late stage by means of an interlocutory injunction. To allow them to do so in the present circumstances, would in our opinion be tantamount to permitting the respondents to abuse the process of the court, and would unreasonably prejudice the appellant from enjoying the fruits of their final judgment. It is true that the respondents have now obtained a judgment against the appellant bank in the present action which the Supreme Court has remitted to the lower court for assessment of damages. However, the appellant is in the business of banking, and, we cannot accept the argument that the respondents could not be restored to their original position should the damages assessed against the appellant exceed $13.9m. In any event the fear of the first respondent from being wound up should the appellant bank file a petition against them under s 217 of the Companies Act 1965, should not tilt the balance of convenience in their favour, as it is for them to oppose such petition and convince the High Court at the appropriate time that they would be entitled to a judgment of more than $13.9m and are able to pay their debts under s 218 of the Act.

The learned judge in dismissing the appellant's application to set aside the ex parte order of interim injunction gave the following cryptic reasons at p 38 of the notes of evidence:

(i) Jurisdiction — s 54 only applies to perpetual injunction.
(ii) This is only an application in the nature of stay of execution.
(iii) Order 14 — applicable.

Although he did mention balance of convenience at p 39, it is not clear how he came to the conclusion that the balance is in favour of the respondents. Nor did he identify the serious issues to be tried. We have sufficiently dealt with the second and third points to show that the failure to apply for stay in the 1986 action is fatal, and for reasons already discussed, the learned judge erred in law to grant a stay of execution of the O 14 judgment by a back door method after the right has been waived.

This would leave for our consideration only the first point under s 54 of the Specific Relief Act 1950 (Rev 1974). We would reproduce paragraphs (a), (b) and (i) of the section:

> An injunction cannot be granted —
>
> (a) to stay a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;

(b) to stay proceedings in a Court not subordinate to that from which the injunction is sought; A

...

(i) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust;

We do not really understand how a provision prohibiting the grant of perpetual injunction under s 54 of the Specific Relief Act 1950 can confer jurisdiction to the High Court to an extent that it can override the provisions of the RHC and the Courts of Judicature Act 1964 in the matter of stay of execution especially relating to a final order of the Supreme Court. Mr Narayanan has referred to us two authorities which he attributes as the pillars of his argument. The first case is *Tan Suan Choo v Majlis Perbandaran Pulau Pinang*,[5] where on a preliminary objection by the defendant, it was held that the prohibition imposed by s 54(d) of the Specific Relief Act 1950 applied only to application for perpetual injunction but had no relevance to temporary injunction sought by the plaintiff to restrain the defendant from demolishing the plaintiff's premises. The next case cited is *Bina Satu Sdn Bhd v Tan Construction*[6] where in overruling a preliminary objection raised by Tan Construction against Bina Satu's application to restrain them from petitioning to wind up the company, VC George J held that s 54(b) of the Act should be read as having reference to only perpetual injunction, and that s 54(b) relates to injunctions imposed on other courts and not to injunctions imposed on the parties to the litigation. There, the fundamental issue for determination was whether s 54(b) had the effect of excluding or watering down the court's inherent jurisdiction preserved by s 23(2) of the Courts of Judicature Act 1964 to grant an order restraining the abuse of the court's process. It should be noted that both the High Court authorities cited dealt with preliminary objections before the merits of the applications for interlocutory injunction were considered. In the circumstances we agree with Mr Naban that the s 54 argument is a red herring and that the authorities cited do not assist the respondents. In this appeal the existence of the power of the High Court to grant interlocutory injunction does not appear to be in doubt. It is only the propriety of its application according to established principles which is in issue.

In our view, irrespective of whether an interim injunction is sought on the basis of statutory provisions or on the inherent jurisdiction of the court to restrain abuse of its process, it must be exercised judicially according to law on established principle of granting injunction as enunciated in *American Cyanamid Co v Ethicon Ltd*[7] which has been consistently applied by the courts in this country.

Although an interlocutory injunction is a discretionary relief vested in the judge of the High Court, and the function of an appellate court is not to exercise an independent discretion on its own, failure to consider statutory provisions and failure to consider balance of convenience entitle this court to rehear the whole application, since the granting of it was wrong in law and therefore not an exercise of the judicial discretion (see *Penang Han Chiang Associated Chinese Schools Association v National Union of Teachers in Independent Schools, West Malaysia*.[8] In the absence of a written judgment or

grounds of judgment, we are entitled to hold from the notes of evidence that the learned judge is in error when he seems to conclude that just because s 54 only applies to perpetual injunction, he is compelled to grant the interlocutory injunction without directing his mind to the interplay between the provisions of the Courts of Judicature Act 1964, the RHC and the Specific Relief Act 1950, and by giving mere lip service to the principle of granting interlocutory injunction as laid down in the *American Cyanamid* case.[7] When asked to do so, Mr Narayanan was unable to assist us on the question of whether the general power of the High Court to stay execution of O 14 judgment by interim injunction under the Specific Relief Act 1950 could override the specific provisions for stay of such judgment in the Courts of Judicature Act 1964 read with the RHC. Be that as it may, we are of the view that on the facts and circumstances of this particular case, the interlocutory injunction cannot be sustained in view of the failure of the learned judge to consider the relevant statutory provisions governing stay of execution of summary judgment where a counterclaim has been made or raised, quite apart from his failure to consider critically not only the issue of balance of convenience but also to consider what serious questions need possibly be tried in the pending action, particularly now when all that is left for determination is the assessment of damages. In the event, the granting and continuing of the interlocutory injunction cannot be said to be an exercise of judicial discretion by the learned judge, and the appellant's application to discharge the injunction ought therefore to be allowed.

For the above reasons, the appeal is allowed with costs, and the deposit is refunded to the appellant.

Appeal allowed.

Reported by Prof Ahmad Ibrahim